No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ALASKA NATIVE SUBSISTENCE USERS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Alaska Native tribes, organizations and subsistence users who support federal jurisdiction to regulate waters in Alaska Conservation System Units ("CSUs") to protect the subsistence fishing way of life upon which rural Alaska Native people vitally depend. Indeed, without federal regulation of navigable waters within CSUs, the fishing rights Congress expressly protected in Title VIII of the 1980 Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3111-3126, would become a nullity; and "[i]f [Alaska Natives'] right to fish is destroyed, so too is their traditional way of life." *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991).

Amici agree with the government that Congress granted to the National Park Service ("NPS") authority to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States" in the 1976 amendment to the National Park Service Organic Act. Pub. L. No. 94-458, 90 Stat. 1939, amending the Act of August 25, 1916, Pub. L. No. 64-235, 39 Stat. 535 ("Organic Act"). Under this authority, the United States has long regulated waterways in National Parks, including promulgating the hovercraft regulation at issue here.

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. Petitioner filed a blanket consent with this Court, and the United States provided its consent.

Congress expressly made the Organic Act applicable to all CSUs created or expanded in ANILCA, including the Yukon-Charley Rivers National Preserve. ANILCA section 203, 16 U.S.C. § 410hh-2. It did not withdraw that express delegation of regulatory authority when it enacted section 103(c) of ANILCA, which provides that Alaska state lands and Native Corporation lands within CSUs are exempt from certain federal regulation. 16 U.S.C. § 3103(c). Nothing in this provision calls into question NPS's preexisting authority to regulate the water column of the Nation River or other navigable "waters located within areas of the National Park System." These waters are not exempted from Park Service jurisdiction by the limitations set forth in section 103(c).

Moreover, Congress sought to achieve numerous purposes in enacting other provisions of ANILCA, including supporting subsistence fishing and hunting and protecting bodies of water and their fish and marine mammal populations. Petitioner's interpretation would undermine or nullify a number of those clear purposes and provisions. While petitioner and *amicus* State of Alaska disclaim any intent to displace federal protection and management of subsistence fishing on rivers within CSUs, the sweeping nature of their legal theories would directly jeopardize protective federal regulations that have been in place since 1999.

Over the past two decades, *amici* and other tribes and tribal organizations have engaged in litigation to secure their federally protected subsistence fishing rights on navigable waters in Alaska—rights embodied in these federal regulations. In the long-running "*Katie John*" litigation, the courts upheld the

federal determination—made after notice and comment rulemaking—that certain navigable waters within CSUs and national forests are "public lands" within the meaning of Title VIII of ANILCA, 16 U.S.C. §§ 3111-3126. *See Alaska v. Babbitt* (*"Katie John I"*), 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 516 U.S. 1036, and 517 U.S. 1187 (1996); *John v. United States* (*"Katie John II"*), 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam); and *John v. United States* (*"Katie John III"*), 720 F.3d 1214, 1225 (9th Cir. 2013), *cert. denied sub nom. Alaska v. Jewell*, 572 U.S. 1042 (2014) (collectively, "*Katie John* litigation"). The courts deferred to the Secretary of the Interior's determination that the definition of "public lands" in ANILCA includes navigable waters in which the United States owns federally reserved water rights, and further concluded that this interpretation is necessary to carry out Congress's purposes in establishing the CSUs. Thus, the courts upheld federal subsistence fishing regulations covering those waters. *Katie John III*, 720 F.3d at 1226.

Two of the *amici* here, the Mentasta Traditional Council and the Village of Dot Lake, are federally recognized tribes and are the home Villages of the plaintiffs in the *Katie John* litigation. Nora David is Katie John's daughter and representative of the John family seeking to preserve her mother's legacy. The Kenaitze Indian Tribe and the Organized Village of Saxman are federally recognized tribes that enjoy the protections that Titie VIII accords their traditional subsistence hunting and fishing activities. Most of the tribal members in these villages are both subsistence

users and shareholders in Alaska Native Corporations.[2]

In the *Katie John* litigation, *amici* here and others engaged in a sustained effort to ensure and support the priority for subsistence uses of fish in Title VIII of ANILCA. *See Katie John III*, 720 F.3d at 1218-24 (recounting history of subsistence management). That is their vital interest in this case as well.

SUMMARY OF ARGUMENT

This is not a case about "principles of federalism," Pet. Br. at 22. This is a case involving the interpretation of federal statutes assigning regulatory authority in areas of unquestioned and unquestionable federal power. Nor is this a case about who has "title" to the Nation River. No one owns the water column of a navigable river in a National Park or Preserve. The United States and the States have regulatory authority and interests in aspects of such rivers, including submerged lands, fish and other marine life, navigation and more. Water rights may be established pursuant to state law, or by the United States under the federal reserved water rights doctrine. Where, as here, Congress clearly confers regulatory authority on a federal agency, that regulatory authority trumps conflicting state regulations in the same arena. This Court should reject petitioner's effort to convert an exercise in statutory interpretation into a referendum

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[2] Additional *amici* are the Tanana Chiefs Conference and Chugachmuit, two Alaska Native inter-tribal consortia which together represent 49 tribal villages located in the Interior and Prince William Sound regions of Alaska. *Amicus* Alaska Federation of Natives was organized in 1966 and is the largest statewide Native organization formed to protect Alaska Native lands and hunting and fishing rights.

on States' rights, and affirm the decision below for three reasons.

First, Congress expressly delegated authority to regulate navigable waters in the National Park system to the Secretary of the Interior in the Organic Act. And in section 203 of ANILCA Congress expressly directed that the Secretary "shall administer the lands, waters, and interests therein" within the Alaska Parks and Preserves "as new areas of the National Park System" under the Organic Act. 16 U.S.C. § 410hh-2.

Section 103(c) of ANILCA—a provision added to the statute at the last minute in a section entitled "Maps"—did not in any way eliminate the Secretary's long-held authority acknowledged in section 203. Indeed, section 103(c) only addresses Park Service regulation of State, Native and private lands within park boundaries, but does not control the regulation of navigable waters, which were not conveyed to any of these parties.

Second, assuming for argument only that section 103(c) of ANILCA limits the Secretary's regulatory authority to "public lands" within Alaska National Parks and Preserves, navigable waters still constitute "public lands" as defined in the Act. "Public lands" include waters where the United States has title to "interests therein," as it unquestionably does with respect to "navigable" waters. Specifically, the federal government holds title to an interest in such waters (including interests in the Nation River flowing through the Yukon-Charley Rivers National Preserve) under the doctrine of reserved water rights. If there were doubt on this score, the Secretary has so interpreted ANILCA in regulations issued pursuant to notice and comment rulemaking, and Congress has

ratified the Secretary's regulatory determinations. Part II.

Third, numerous provisions of ANILCA addressing Congress's purpose to protect and preserve the waters of newly created Alaska National Parks and Preserves and the subsistence way of life in these areas make no sense if the Secretary lacks authority to regulate navigable waters within those Parks and Preserves. As this Court noted in *Sturgeon v. Frost*, "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." 136 S.Ct. 1061, 1070 (2016) (*quoting Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 101 (2012)). Part III.

ARGUMENT

I. CONGRESS IN THE ORGANIC ACT AND IN ANILCA AUTHORIZED THE SECRETARY OF THE INTERIOR TO REGULATE NAVIGABLE WATERS WITHIN NATIONAL PARKS AND PRESERVES, INCLUDING IN ALASKA.

Congress indisputably enjoys the constitutional power to authorize the Secretary of the Interior to regulate navigable waters of the United States within National Parks and Preserves, and it did so through the 1976 amendments to the Park Service Organic Act. Congress acknowledged the exercise of that power in section 203 of ANILCA, 16 U.S.C. § 410hh-2. Congress did not then surreptitiously curtail that authority in section 103(c) of ANILCA, 16 U.S.C. § 3103(c), entitled "Maps," which protects Alaska Native corporation and State inholdings from some Park Service regulations within CSUs. *Amici* agree with the government that

the decision below can be affirmed on this ground alone.

Because Congress's powers over navigable waters under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Property Clause, U.S. Const. art. IV, § 3, cl. 2, are extremely broad, there is no doubt that federal legislative and regulatory authority extends to navigable waters within national parks and preserves. Indeed, the United States has "paramount power" over all navigable waters in the Nation. *PPL Mont. LLC v. Montana*, 565 U.S. 576, 591 (2012) (citations omitted). Thus, navigable waters are subject to the jurisdiction of the United States. *United States v. Rands*, 389 U.S. 121, 123 (1967); A. Dan Tarlock, *Law of Water Rights and Resources* § 9.6 (2018) ("Federal jurisdiction over waters now extends to all activities subject to the full Commerce Clause[.]").

A. Congress Authorized The Secretary To Regulate Activities On Navigable Waters, And ANILCA Expressly Incorporated That Power For CSUs In Alaska.

In a 1976 amendment to the National Park Service Organic Act, Congress authorized the Secretary of the Interior to regulate waters within the National Park System. Specifically, that law provides that "[t]he Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations . . . concerning boating and other activities on or relating to water located within System units, *including water subject to the jurisdiction of the United States*." 54 U.S.C. § 100751(b) (emphasis added). Exercising the Secretary's authority under the 1976 amendment, as well as the 1916 Organic Act, the Park Service promulgated the regulation at issue here. That

regulation states, "[t]he operation or use of hovercraft [in National Parks] is prohibited." 36 C.F.R. § 2.17(e).

All parties agree that the Nation River is a navigable river for purposes of federal law, and that this Park Service regulation applies to boating on the River. The Organic Act as amended constitutes a clear statement of the United States' power to regulate navigable waters in National Parks and Preserves, and grants the Park Service authority to exercise that regulatory power.

In section 203 of ANILCA, Congress reiterated the Secretary's clear authority to regulate these waters, commanding that the Secretary "shall administer the lands, waters, and interests therein" within the Alaska Parks and Preserves (including the Yukon-Charley Preserve) "as new areas of the National Park System" under the Organic Act. 16 U.S.C. § 410hh-2 ("the Secretary shall administer the lands, waters, and interests therein added to existing areas or established by the foregoing sections of this subchapter as new areas of the National Park System, pursuant to the provisions of the Act of August 25, 1916 (39 Stat. 535), as amended and supplemented (16 U.S.C. § 1 *et seq.*)."). *See also* H.R. Rep. No. 96-97 at 171 (1979) ("The Yukon-Charley Rivers National Preserve . . . should be managed *in the same manner as a national park*, except that hunting and trapping shall be allowed.") (emphasis added); S. Rep. No. 96-413 at 162 (1979) (same).

B. ANILCA Did Not Strip The Secretary Of The Power To Regulate Navigable Waters In CSUs.

The question presented, accordingly, is not whether section 103(c) of ANILCA contains an express

statement of the United States' authority to regulate the Nation River. Instead, it is whether section 103(c) clawed back some of the United States' clear power. It did not. Section 103(c) is part of a section of ANILCA called "Maps," and entitled "Lands included within unit; acquisition of land by Secretary." It provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as defined in the Act) shall be deemed included in the unit. No lands which before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.

16 U.S.C. § 3103(c). This section does not withdraw the Secretary's express authority under the Organic Act and section 203 of ANILCA to regulate navigable waters within CSUs in Alaska. As pointed out by the United States, section 103(c) was characterized by its sponsors as a technical amendment without substantive effect on federal authority to protect and regulate activities on or related to navigable waters. U.S. Br. at 26-30; 40-50.

In arguing the contrary, petitioner first focuses on the second sentence of this section, which protects State-owned, Native Corporation-owned and privately owned "lands" in CSUs in Alaska from certain federal regulation. But navigable waters are not lands which were conveyed to the State, Native Corporations or private persons; thus, this section does not restrict the Secretary's authority under the Organic Act and section 203 to regulate navigable waters within CSUs.

Indeed, contrary to the *amicus* State's view, State Br. at 16, navigable waters within the Yukon-Charley

Rivers National Preserve (such as the Nation River) and other CSUs are not "owned" by the State and were never "conveyed" to the State. States do not hold title to navigable waters, though they generally hold "title to and ownership of the lands *beneath* navigable waters." 43 U.S.C. § 1311(a) (emphasis added).[3] As Justice Scalia explained in *Alaska v. United States*, 545 U.S. 75 (2005), state ownership of submerged lands does not diminish federal authority to regulate activities in navigable waters:

> If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power. *See, e.g.*, 43 U.S.C. § 1314(a) (under the Submerged Lands Act, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation"); . . . *United States v. California*, 436 U.S. 32, 41, and n. 18 (1978) (noting that the

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[3] The State relies on the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301-1315, in support of its argument that it "owns" the Nation River and other navigable waters and therefore that these waters are not subject to federal regulation. Congress enacted the SLA in 1953 to reverse this Court's decisions holding that the United States, and not the States, holds title to the beds underlying the marginal sea. *See* Robin Kundis Craig, *Treating Offshore Submerged Lands As Public Lands: A Historical Perspective*, 34 Pub. Land & Resources L. Rev. 51, 69-70 (2013) (footnotes omitted). In the SLA, Congress recognized state ownership of submerged lands, but not of any water. *See* 43 U.S.C. § 1311(a)(1) (confirming title and ownership of "the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," but not title to the waters themselves).

> United States retained "its navigational servitude" even when California took the "proprietary and administrative interests" in submerged lands surrounding islands in a national monument). . . . It is thus unsurprising that States own submerged lands in other federal water parks, such as the California Coastal National Monument and the Boundary Waters Canoe Area in Minnesota.

Id. at 116-18 (Scalia, J., concurring in part and dissenting in part) (footnote omitted); *see also Rands*, 389 U.S. at 127 (the SLA "left congressional power over commerce . . . precisely where it found [it]"); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426-27 (1940) ("The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government.").[4]

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[4] With ownership of submerged lands, the States acquired some authority to regulate associated waters, *see* 43 U.S.C. § 1311(a)(2), absent preemptive federal regulation of navigable waters. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706-707 (1899). However, the States do not "own" the water column or displace federal authority to regulate by virtue of having such regulatory authority. *See* Thompson, Leshy, Abrams & Zellmer, *Legal Control of Water Resources* 591 (6th ed. 2018) ("[T]he most distinctive legal feature of water is its status as a public resource that cannot be privatized in the ordinary way."). Whatever the extent of the State's power, it is subject to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Mont.*, 565 U.S. at 591 (*quoting United States v. Oregon*, 295 U.S. 1, 14 (1935) (additional citations omitted)); *see also* 43 U.S.C. § 1314(a) (under the SLA, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation").

In fact, although the United States has jurisdiction over all navigable waters and the Park Service has express authority to regulate navigable waters within National Parks and Preserves, "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in navigable waters. *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954); *see also United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) ("Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."); *United States v. Twin City Power Co.*, 350 U.S. 222, 226 (1956) (federal navigational servitude can preempt any use rights granted by a State to a private party, so that compensation under the Fifth Amendment is not required for taking such interests).

The conveyance of "lands" within CSUs to the State, Native Corporations, and private owners does not convey ownership of the associated navigable waters and thus does not alter the United States' authority, exercised in the Organic Act and section 203 of ANILCA, to regulate those waters. Petitioner relies on the first sentence of section 103(c), which defines the lands within CSUs that are "public lands." ANILCA defines "public lands" as "lands, waters, and interests therein" to which the United States holds title. 16 U.S.C. § 3102(1)-(3). That definition of "public lands" does not purport to alter the Secretary's pre-existing authority to regulate "boating or other activities on or relating to water located within [National Park] System units, including water subject to the jurisdiction of the United States," 54 U.S.C. § 100751(b), all as incorporated into ANILCA in section 203. The Secretary's power reaches all

activities on National Park System waters, and expressly includes waters subject to U.S. jurisdiction, a category that embraces navigable waters.

What this means is that section 203 of ANILCA explicitly recognizes the Secretary's regulatory authority conferred by the Organic Act. 16 U.S.C. § 410hh-2. That authority is subject to a proviso that protects hunting in certain areas and "[s]ubsistence uses by local residents . . . in national preserves and, where specifically permitted by this Act, in national monuments and parks." *Id.* But, critically, the Secretary's existing regulatory authority over navigable waters in the National Park System is reconfirmed in ANILCA and not otherwise qualified.

In sum, the Nation River is not private property, nor is it owned by the State of Alaska. It constitutes navigable water within a National Park or Preserve. Congress indisputably has constitutional authority to regulate such waters. By the Organic Act, it delegated that authority to the Secretary of the Interior and the National Park Service, which promulgated the regulation at issue here. Section 203 expressly acknowledges the Secretary's delegated authority to regulate navigable waters within the CSUs of Alaska, and section 103(c) does not rescind it.[5]

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[5] To be sure, Congress in ANILCA provided a modified regime for National Park Service administration in Alaska. As the Court noted in *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070-72 (2016), many of these exceptions are directed to access and fishing regulation. For instance, section 811(b), 16 U.S.C. § 3121(b), requires the Secretary to provide for reasonable "motorboat[]" access to subsistence users, and section 1110(a), 16 U.S.C. § 3170(a), makes an exception for "snowmachines" on "frozen river[s]" and for "motorboat[]" uses to the extent necessary for "traditional activities" and "for travel to and from villages and homesites." The Park Service is required to develop a management plan that

II. FEDERAL RESERVED WATERS ARE INTERESTS IN LANDS WITHIN THE MEANING OF ANILCA'S PUBLIC LANDS DEFINITION.

Even assuming—contrary to Part I—that section 103 of ANILCA limits the Secretary's authority to regulate navigable waters only to "public lands," that requirement is satisfied in this case. "The term 'public lands' means lands situated in Alaska which . . . are Federal lands, except [State and Native corporation selected lands]." 16 U.S.C. § 3102(1). "Federal lands" means lands whose "title . . . is in the United States," and "land" means "lands, waters, and *interests therein*." 16 U.S.C. § 3102(1)-(3) (emphasis added). The United States has a proprietary interest in the navigable waters of Alaska's CSUs that fully supports its regulation of the uses of those waters.

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includes "[a] description of the programs and methods that will be employed to manage fish and wildlife resources and habitats . . . [.]" Section 1301(b)(2), 16 U.S.C. § 3191(b)(2). Section 1310, 16 U.S.C. § 3199, provides for the maintenance and construction of navigation aids on waters within CSUs. Section 1313, 16 U.S.C. § 3201, provides for the administration of Preserves (including the Yukon-Charley Rivers National Preserve) and contains a directive that "the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed in a national preserve under applicable State and Federal law and regulation." And of course, Title VIII provides a priority for subsistence fishing—which takes place in navigable waters. Section, 804, 16 U.S.C. § 3114. These exceptions and mandates would be wholly unnecessary if the Secretary lacked general jurisdiction under section 203 and the Organic Act to regulate uses of navigable waters within CSUs. *See* U.S. Br. at 40-50.

A. The United States Holds An Interest In Navigable Waters Within The Meaning Of ANILCA Section 102.

The United States has a reserved interest in waters associated with federal land reservations to the extent necessary to achieve the purposes for which Congress reserved the lands, commonly known as the reserved water rights doctrine. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see also United States v. New Mexico*, 438 U.S. 696, 707-11 (1978). As the Court has explained, federal reserved rights to water are established "when the Federal government withdraws its land from the public domain and reserves it for a federal purpose, [and] the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138. There is "no doubt about the power of the United States under [the Commerce Clause and the Property Clause] to reserve water rights for its reservations and its property." *Arizona v. California*, 373 U.S. 546, 598 (1963). And such reservations may be made before or after statehood. *Id.* at 597-98.

Contrary to petitioner's argument (Pet. Br. at 36), water rights have consistently been recognized as property interests subject to ownership and as such are interests in waters, title to which is in the United States. Although usufructuary in nature, water rights constitute real property that may be bought and sold, assigned, mortgaged, and leased, and may not be taken by the government without payment of just compensation. *See Dugan v. Rank*, 372 U.S. 609, 625-26 (1963) (when the Government subordinated the respondents' water rights to a federal project there was an appropriation of property for which

compensation should be made); *Fed. Power Comm'n v. Niagara Mohawk Power Co.*, 347 U.S. 239, 251-52 (1954) ("The [Federal Water Power] Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself."); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754-755 (1950) (construction of Friant Dam resulted in taking of riparian rights to seasonable flood waters); *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1161 (Or. 2010) (en banc) ("Oregon has recognized and continues to recognize that persons who put water to beneficial use can acquire an equitable or beneficial property interest in a water right to which someone else holds legal title."). *See also* Tarlock, *supra* § 9:32 (collecting cases).[6]

Petitioner and the State denigrate usufructuary water rights as "far less than title," State's Br. at 28; *see* Pet. Br. at 27-28, and claim that ANILCA requires something more than an "interest" in water. But as used in ANILCA, the term "title" is not limited to property subject to a deed of conveyance. The sheer volume of takings litigation involving interference

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[6] Federal reserved water rights can protect out-of-stream consumptive uses, or more often, the right to maintain water levels or river flows at a certain level. *See Cappaert*, 426 U.S. at 138, 141 (recognizing federal reserved water right to protect fish habitat in pool in Devil's Hole National Monument); *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983) (reserved waters for protection of fish habitat in upper Klamath Lake and Marsh); *Potlach Corp. v. United States*, 12 P.3d 1256, 1258 (Idaho 2000) (water reserved to protect river levels under Wild & Scenic Rivers Act).

with these "usufructuary rights" in water in both state and federal courts demonstrates their importance in our property scheme. The holder of a water right under state or federal law has important ownership interests protected by state and federal constitutions.

Equally to the point, the interpretation offered by petitioner and the State—resting on a narrow interpretation of the word "title"—would read the phrase "waters and interests therein" out of the statute. Doing so would conflict with the cardinal rule that courts should give effect to every word of a statute and presume that Congress meant what it said. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Indeed, in interpreting another provision of ANILCA, this Court has noted that federal "title" interests in land or water should *not* be construed in a narrow fashion. In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987), the government argued that section 810 of ANILCA, 16 U.S.C. § 3120, did not apply to the Outer Continental Shelf ("OCS") because the United States did not hold title to the OCS or its mineral resources. This Court rejected the argument:

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."

Amoco, 480 U.S. at 548 n.15. Similarly here, petitioner's claim that the United States does not have

"title" to an "interest" in the navigable waters of Alaska CSUs takes an artificially narrow view of the definition of public lands in ANILCA, and is based on a misunderstanding of the reserved water rights doctrine and the nature of property interests in water. Pet. Br. at 27; State's Br. at 4, 22-24.

Accordingly, the United States owns an "interest" in the navigable waters within Alaska's CSUs under the reserved water rights doctrine; those waters are therefore "public lands" within the meaning of ANILCA to the extent of that interest; and the Secretary has authority to regulate those waters.

B. The Secretary's Interpretation Of Section 103 Of ANILCA Is Entitled To Deference On Its Own Terms And Has Been Ratified By Congress.

Even if ANILCA's definition of "public lands" were deemed ambiguous in this respect, that ambiguity would be resolved by longstanding federal regulations interpreting statutory definitions of "public lands" to include waters within CSUs in which the United States has an interest under the reserved water rights doctrine. Moreover, Congress has ratified that regulatory interpretation of ANILCA's "public lands" definition.

As noted above, in enacting ANILCA, Congress directed that the Secretary of the Interior "shall administer the lands, waters and interests therein" under the Organic Act, 16 U.S.C. § 410hh-2, which had delegated to the Park Service the authority to regulate waters within the Park System for the "fundamental purpose" of conserving the scenery, natural objects, and wildlife within their borders, 54 U.S.C. § 100101(a). In addition, in ANILCA Congress stated

its purposes in reserving the areas specified, including safeguarding waters, protecting aquatic wildlife, preserving marine recreation and preserving subsistence use, including fishing. 16 U.S.C. § 3101. Critical to *amici* is the protection Congress afforded subsistence fishing in navigable waters in Title VIII.

To achieve the Act's objective of preserving and supporting subsistence uses, Congress stated in section 804 that on all "public lands" in Alaska the taking of fish and wildlife for subsistence uses "shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114. ANILCA offered Alaska the option of effectuating that subsistence priority by "enact[ing] and implement[ing] laws of general applicability" consistent with that priority by a date certain. *Id.* § 3115(d).

Thereafter, Alaska implemented a subsistence-use priority for hunting and fishing. However, the Alaska courts invalidated that state priority. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). As a result, the Departments of Interior and Agriculture promulgated temporary regulations that implemented ANILCA's subsistence-use priority on "public lands." *See* Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990). The final regulations adopted in 1992 generally excluded navigable waters, except where the United States reserved the submerged lands prior to statehood. *See* Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. 22,940, 22,942 (May 29, 1992).

The Secretary subsequently determined that "public lands" under ANILCA include the navigable waters in which the United States possesses reserved water rights. The Ninth Circuit agreed and held that "public

lands" as defined in ANILCA include "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Katie John I*, 72 F.3d at 703-04. *See generally Katie John Litigation*, *supra*.

Once *Katie John I* was decided, the Secretary promulgated permanent regulations explaining that the United States held reserved water rights in the navigable waters within Alaska CSUs, and therefore that these waters constitute "public lands" under ANILCA. 50 C.F.R. § 100.3 (1999); *see* Subsistence Management Regulations for Public Lands in Alaska, 64 Fed. Reg. 1279 (Jan. 8, 1999); *see also* Subsistence Management Regulations for Public Lands in Alaska, 62 Fed. Reg. 66,216, 66,217-218 (Dec. 17, 1997) (proposed rule). Congress specifically delayed the implementation of these regulations on several occasions to give the State an opportunity to amend its laws to allow a subsistence-use priority on public lands and thereby eliminate the need for federal regulations enacting that priority. Omnibus Consolidated and Rescissions Appropriations Act of 1996, Pub. L. No. 104-134, § 336, 110 Stat. 1321 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 317, 110 Stat. 3009 (1997); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 316(a), 111 Stat. 1543 (1998). Ultimately, however, the State failed to act.

As a result, Congress instructed that the federal regulations should take effect. *See* Department of the Interior and Related Agencies Appropriations Act, 1999 (1999 Appropriations Act), Pub L. No. 105-277, Div. A, § 101(e), § 339(a)(1) and § 339(b)(2), 112 Stat. 2861, 2681-296 (repealing prior restriction on effective date of regulation); 16 U.S.C. § 3102 note. This

chronology shows that Congress attended to the regulations at issue (including their interpretation of the term "public lands"), understood their meaning, and made a deliberate decision that they should become effective. *See, e.g., N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (citations and quotation marks omitted); *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (congressional awareness of interpretation of statute is proof of ratification of interpretation). Given the multiple enactments on the subject, "it is hardly conceivable that Congress . . . was not abundantly aware of what was going on." *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). Indeed where, as here, Congress acts by "positive legislation" to adopt an existing agency position (as contrasted with merely reenacting a previously construed term), the "administrative construction" is "virtually conclusive." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

Twenty-two years ago the Park Service issued new national regulations stating that Park Service rules apply on all navigable waters within the Park System. *See* General Regulations for Areas Administered by the National Park Service and National Park Systems in Alaska, 61 Fed. Reg. 35,133 (July 5, 1996) (36 C.F.R. 1.3(a)(2)) (explaining that the rules would "clarif[y] and interpret[] existing NPS regulatory intent, practices and policies"); *id.* at 35,135 (rejecting Alaska's argument that ANILCA section 103(c)

"preempt[ed] [the National Park Service's] well-established authority on navigable waters" in Alaska National Parks). The Secretary also observed that the State's contrary position would be inconsistent with ANILCA's underlying purposes. *Id.* at 35,135. Subsequent regulations are in accord and have uniformly been upheld by the court of appeals. *See, e.g., John v. United States*, 720 F.3d 1214 (9th Cir. 2013), *cert. denied sub nom. Alaska v. Jewell*, 572 U.S. 1042 (2014).

In sum, for nearly two decades the federal government has treated the identified waters of Alaska CSUs as "public lands" by virtue of the government's reserved water rights (and on that basis has applied Title VIII's subsistence fishing priority to those waters). The federal government has by regulation also treated all navigable waters within Alaska CSUs as subject to the Park Service's authority granted under the 1976 Organic Act amendments. Those twin determinations are entitled to deference. Further, the regulatory chronology and pathway demonstrates that, with respect to the Secretary's understanding of the term "public lands," Congress ratified the Secretary's regulations. That should be the end of the matter.

C. The Attempt To Distinguish The Definition Of "Public Lands" For Subsistence And Other Purposes Is Not Persuasive.

Petitioner and the State proffer the fall-back argument that this Court can rule in petitioner's favor without "disturb[ing]" the federal regulations governing subsistence management approved in the *Katie John Litigation*. State Br. at 29-35; Pet. Br. at 34-35. Specifically, they argue that "public lands"

might mean something different in Title VIII (subsistence) than it does in other ANILCA Titles.

While *amici* support all efforts to recognize and preserve the *Katie John* decisions, we regretfully believe that arguments attempting to distinguish the scope of "public lands" for Title VIII, on the one hand, and the rest of ANILCA, on the other, would undermine the foundation on which the *Katie John* rulings stand. Title I of ANILCA, 16 U.S.C. § 3102, "provides that the definitions apply to the entire Act, except that in Title IX, which provides for implementation of ANCSA and the Alaska Statehood Act, and in Title XIV, which amends ANCSA and related provisions, the terms shall have the same meaning as they have in ANCSA and the Alaska Statehood Act." *Gambell*, 480 U.S. at 546 n.13 (internal citation omitted). There is no separate definition of "public lands" for purposes of Title VIII of ANILCA governing subsistence uses.

Further, when Congress identified its purposes for reserving public lands in ANILCA, *see* 16 U.S.C. §§ 410hh, 3101, it did not differentiate among the multiple purposes it was serving. It expressly identified several purposes for reserving land, including subsistence uses but also the protection of waters, rivers and fish. *Id.* The achievement of *all* these purposes—not just support for subsistence use—requires the reservation of appurtenant waters.

III. PETITIONER'S INTERPRETATION OF ANILCA SECTION 103(C) MAKES NO SENSE WHEN THE FULL STATUTORY CONTEXT IS CONSIDERED.

Amici have shown both that section 103(c) of ANILCA does not suggest any diminution of the

Secretary's authority to regulate navigable waters within CSUs, and that even if the Secretary's regulatory authority in such areas were limited to "public lands," then navigable waters within CSUs are public lands. In either case, however, petitioner's and the State's reading of section 103(c) makes no sense when it is examined in the context of the full statutory scheme in which it is embedded.

First, and most notably, Congress expressed its four objectives plainly:

- To preserve "lands and waters" protected by ANILCA "for the benefit, use, education, and inspiration of present and future generations," based on their scenic, geological and wildlife values. 16 U.S.C. § 3101(a).
- To protect the designated areas' "natural landscapes," wildlife "resources related to subsistence needs," "rivers[] and lands," and "recreational opportunities," including for canoeing, fishing and hiking "on wildlands and on freeflowing rivers" and "to maintain . . . undisturbed ecosystems." *Id.* § 3101(b).
- To "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," where "consistent with management of fish and wildlife." *Id.* § 3101(c).
- To avoid "the need for future legislation designating" new parks in Alaska. *Id.* § 3101(d).

In all these provisions, Congress is plainly focused on purposes that require protection and regulation of waters.

Moreover, 13 provisions of ANILCA either established or supplemented a unit of the National Park System. In those sections, Congress provided a further statement of its purpose, specifying the natural features of the National Park System which Congress sought to protect. Those purposes all include the protection of waters, including rivers and lakes, the protection of fish and marine mammals, or both. *See* 16 U.S.C. §§ 410hh, 410hh-1.

The statute identified some waters by name, such as the Yukon-Charley Rivers National Preserve which, relevant here, includes the Nation River. 16 U.S.C. § 410hh(10) ("the entire Charley River basin"). With respect to the Yukon-Charley Rivers Preserve, Congress set the following terms:

> The preserve shall be managed for the following purposes, among others: *To maintain the environmental integrity of the entire Charley River basin, including streams, lakes* and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, . . .

Id. (emphasis added).[7] Again, Congress made clear that the specified waters are among the primary features of the National Park System that it intends to protect. Congress plainly did not conceive of those waters as state enclaves of authority within the parks and preserves.

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[7] *See also* 16 U.S.C. § 1274 (25)-(50). (designating 26 rivers as "Wild and Scenic Rivers" under the Wild and Scenic Rivers Act ("WSRA") to "be administered by the Secretary of the Interior" under the WSRA. *Id.*

It is extremely unlikely and, respectfully, absurd to conclude that Congress clearly and repeatedly announced its intent to protect the Nation River and other specified waters within Alaska National Parks and Preserves, while simultaneously withdrawing authority from the National Park Service to regulate those very rivers and waters. Congress's contrary intent is evident not only in its purposes and in establishing new Parks and Park areas, but also from its direction within ANILCA that the Secretary "shall administer the lands, waters, and interests therein" within the new Alaska areas of the National Park System *under the Organic Act*. *See* 16 U.S.C. § 410hh-2.

Second, ANILCA's express purposes and provisions relating to subsistence uses within the National Park System make little sense unless the Park System encompasses the navigable waters within park boundaries. Congress specifically sought to "provide the opportunity for rural residents engaged in a subsistence way of life," including subsistence fishing, to continue that way of life on "public lands" within the National Park System. *See* 16 U.S.C. § 3101(c); *id.* § 3112. These provisions clearly contemplate the protection of "subsistence activities" on public lands, which must include navigable waters to be effective. There can be no dispute that subsistence fishing "has traditionally taken place in navigable waters." *Katie John I*, 72 F.3d at 702. Yet petitioner's reading of ANILCA would have the nonsensical consequence of effectively removing subsistence fishing from the coverage of a statute that in Title VIII mentions fish 45 times.

Bluntly, Congress could not achieve its express purpose of protecting the subsistence way of life in

Alaska, which centrally depends upon subsistence fishing, without including navigable waters in ANILCA's "public lands." The importance of subsistence fishing to Alaska Native subsistence users cannot be overestimated. A ruling removing federal reserved waters from the definition of "public lands" would be a disaster for subsistence users considering "[a]pproximately 40 million pounds of fish and wildlife are harvested annually by subsistence users, of which fish account for 60 percent." Dep't of the Interior, *Environmental Assessment, Modification of the Federal Subsistence Fisheries Management Program* ch. III, at 1 (1997), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/subsistence/library/ea/upload/EAModFSFMP.pdf. *See also* Alaska Dep't of Fish and Game, *Subsistence in Alaska: A Year 2014 Update*, https://www.adfg.alaska.gov/static/home/subsistence/pdfs/subsistence_update_2014.pdf.

As this Court has often said, statutes must be construed as a whole, and isolated sections must be considered in their context, with an eye toward accomplishing the broad objectives of the statute. *Sturgeon*, 136 S.Ct. at 1070; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *see also Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010). Faithful application of this principle demonstrates that the Secretary has authority to regulate navigable waters within National Parks and Preserves in Alaska.

CONCLUSION

For the foregoing reasons and those set forth by the United States, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

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